90-1025

NO.

In the
Supreme Court of the United States
OCTOBER TERM 1990

FEDERAL DEPOSIT INSURANCE CORPORATION
AS MANAGER OF THE FSLIC RESOLUTION FUND
Plaintiff/Appellant/
Appellee/Respondent

VERSUS

JOHN A. MMAHAT AND MMAHAT & DUFFY
Defendants/Appellants
/Appellees/Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners submit that their Application for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the following questions for review:

1. Should federal courts allow the FDIC to settle tort claims to the prejudice of non-settlors, which is an important federal question not yet settled by this Court, and, specifically in this lawsuit, in a manner which is in direct conflict with the Court of last resort for the State of Louisiana?

2. Should federal courts exempt the FDIC from the requirement of proximate cause in a tort case, which constitutes an important federal question not yet settled by this Court, which is in direct conflict with the law of the Fifth Circuit and other circuits and in direct conflict with

fundamental precepts of tort law, and, specifically in this lawsuit, which is in direct conflict with the Court of last resort for the State of Louisiana?

3. Should this Court clarify its decision in Beech Aircraft Corporation v. Rainey, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) to instruct federal courts on what constitutes trustworthiness and to resolve the refusal of the Fifth Circuit to apply Rainey in its decision?

4. Did the Fifth Circuit improperly apply 11 U.S.C. §523(a)(4) to bar John A. Mmahat's discharge in bankruptcy, contrary to decisions of the Courts of Appeal and of this Court?

LIST OF ALL PARTIES AND CERTIFICATE OF INTERESTED PERSONS

The undersigned certify that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order to comply with Supreme Court Rule 21.1(b) and in order to allow the Justices of this Honorable Court to evaluate possible disqualification or recusal.

1. The Federal Deposit Incorporation Corporation as Manager of the FSLIC Resolution Fund;
2. Office of Thrift Supervision;
3. John A. Mmahat;
4. The Law Firm of Mmahat and Duffy;
5. Peter A. Duffy;
6. New England Insurance Company;
7. American Casualty Company;
8. Pelican Homestead and Savings Association;
9. Richard T. Simmons, Jr. and the Law Firm of Hailey, McNamara, Hall, Larmann & Papale;

10. The Law Firm of Stone, Pigman, Walther, Wittmann & Hutchinson;

11. The Law Firm of Blue, Williams and Buckley, and Donald Hammett, of counsel to the firm;

12. Gulf Federal Savings and Loan Association; and

13. The Law Firm of Chehardy, Sherman, Ellis & Breslin.

Those persons or entities listed above who were parties to the proceeding whose Judgment is sought to be reviewed are the Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund, John A. Mmahat, the law firm of Mmahat & Duffy and New England Insurance Company.

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CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decree sought to be reviewed is the opinion of the United States Court of Appeals for the Fifth Circuit dated August 3, 1990, No. 89-3160, which was reported at 907 F.2d 546. Petitioners filed a Petition for Rehearing en banc which was denied by the United States Court of Appeals for the Fifth Circuit on September 24, 1990. The Order denying the Petition for Rehearing was entered on

September 24, 1990.

Petitioners submit that this case is within the discretionary jurisdiction of this Honorable Court pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

The full text of the statutes cited below are contained in the appendices to this Petition.

1. 11 U.S.C.A. §523(a)(4), (West, 1990).

2. 12 U.S.C.A. §1730(k)(1), (West, 1990) (repealed).

3. 28 U.S.C.A. §1254(1), (West, 1990).

4. Federal Rule of Evidence 803(8)(c), (West, 1990).

5. Financial Institution Reform, Recovery and Enforcement Act of 1989, ("FIRREA"), P.L. 101-73, §401(f), 103 Stat. 356; §407, 103 Stat. 363.

6. Louisiana Civil Code Article 1803, (West, 1990).

7. Louisiana Civil Code Article 1804, (West, 1990).

8. Louisiana Civil Code Article 2323, (West, 1990).

9. Louisiana Civil Code Article 2324, (West, 1990).

STATEMENT OF THE CASE

This matter is one of the many federal lawsuits arising out of the national savings and loan crisis, and it reaches this Court specifically as to allegations by the FDIC of legal malpractice against petitioners John A. Mmahat and the law firm of Mmahat & Duffy.

Gulf Federal Savings Bank of Metairie, Louisiana, was placed into receivership by the Federal Home Loan Bank Board (FHLBB) in November, 1986. The Federal Savings and Loan Insurance Corporation (FSLIC) was appointed Receiver. The FSLIC then brought suit against multiple defendants with regard to certain loan losses sustained by Gulf. The Federal Deposit Insurance Corporation

(FDIC) is the successor to this action.[1]

The lawsuit raised four distinct sets of allegations, each of which was plainly designed to dip into four separate insurance pools.

The FSLIC brought claims against a fidelity bond carrier alleging dishonesty of certain officers of Gulf. The FSLIC also sued an insurer of Gulf's

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1. During the pendency of the appeal of this matter, Congress passed the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. 101-73. FIRREA abolished the FSLIC and saved those actions commenced by the FSLIC. P.L. 101-73, §§ 401(f), 407, 103 Stat. 356, 363. The instant action was assumed by the FDIC, as successor to the FSLIC and as manager of the FSLIC Resolution Trust Fund.

officers and directors, alleging their negligence. The FSLIC then brought a professional malpractice claim against a supervising architectural firm and its insurer.

Finally, and most pertinent to this petition, the FSLIC asserted a negligence claim in tort against John A. Mmahat and the law firm of Mmahat & Duffy alleging legal malpractice. John A. Mmahat, a partner in the firm of Mmahat & Duffy and an attorney for Gulf, was alleged to have given improper advice to Gulf with respect to an FHLBB regulation commonly known as the "Loan to One Borrower Rule". 12 C.F.R. § 563.9-3.

The FSLIC settled its claim against the bond carrier prior to trial, and settled its claims against Gulf's officers and directors, the architect and their insurers during trial. The trial

continued as against petitioners and went to a jury verdict.

At the conclusion of the trial, and before the case was submitted to the jury for decision, John A. Mmahat and Mmahat & Duffy acted to enforce their rights arising from the FDIC's settlements. In a a tort case under Louisiana law, the claim of a settling plaintiff is reduced as against the non-settling defendants by the percentage of fault attributable to the settling defendants.

John A. Mmahat and Mmahat & Duffy submitted to the District Court special jury interrogatories on apportionment of fault to the settling defendants in order to secure this reduction.

John A. Mmahat and Mmahat & Duffy also submitted, in accordance with hornbook tort law, a jury interrogatory on

proximate cause.

The District Court refused to give these special interrogatories to the jury over the timely objections of John A. Mmahat and Mmahat & Duffy. See Appendix E.

The jury returned a verdict finding John A. Mmahat and Mmahat and Duffy negligent, but without making a finding as to the negligence vel non of any other tort-feasors, and without making a finding as to proximate cause.

The District Court entered Judgment on the verdict in favor of the FSLIC and against John A. Mmahat and Mmahat & Duffy. In doing so, the District Court did not make any findings as to the negligence of the settling defendants or as to proximate cause. The District Court also did not reduce the judgment against John A. Mmahat and Mmahat & Duffy by reason of the FDIC's settlements as

required by Louisiana law, or in any other fashion. See Appendix A. The District Court also held that John A. Mmahat's debt was non-dischargeable in bankruptcy. See Appendix B.

Petitioners appealed this result to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit did not address or grant relief on the proximate cause issue.

The Fifth Circuit, on the issue of reduction of the FDIC's judgment, did not reduce the judgment against John A. Mmahat and Mmahat & Duffy as required by Louisiana law, nor did the Fifth Circuit order a new trial.

Instead, the Fifth Circuit found that, "Because the money paid by the settling defendants and recovery from Mmahat overlap, we feel Mmahat should get

credit for the amount paid.", and that, "...[T]he FDIC is not entitled to double recovery of the amount paid by settling defendants...", 907 F.2d at 550, 554.

The Fifth Circuit then remanded the matter to the District Court with instructions, "... [T]o determine what portion of that settlement relates to the loans at issue in this case. Mmahat and the firm should then get a dollar-for-dollar credit for that amount." 907 F.2d at 550. See Appendix C.

Petitioners sought a rehearing en banc from the Court of Appeals for the Fifth Circuit, and this Petition was denied. See Appendix D.

ARGUMENT

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I.

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE QUESTION OF WHETHER FEDERAL COURTS SHOULD PERMIT THE FDIC TO SETTLE CLAIMS TO THE PREJUDICE OF NON-SETTLING PARTIES, BECAUSE THE OPINION OF THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH THE COURT OF LAST RESORT FOR THE STATE OF LOUISIANA, AND BECAUSE IT IS AN IMPORTANT FEDERAL QUESTION NOT YET SETTLED BY THIS COURT

The question presented for review is of critical importance to hundreds of cases currently pending in federal courts nationwide arising from the collapse of savings and loan institutions, i.e., should federal courts permit the FDIC to settle claims to the prejudice of non-settlors?

This Court should decide this question because of its importance to the significant number of pending and anticipated federal cases, and because the

opinion of the Court of Appeals for the Fifth Circuit is in plain conflict with the Supreme Court of Louisiana.

Settlements are favored under federal law, Williams v. First National Bank of Pauls Valley, 216 U.S. 582 at 595, 30 S.Ct. 441 at 445, 54 L.Ed. 625 (1910), but the opinion of the Fifth Circuit makes the settlement of these cases more difficult because of the uncertainty created by the decision. A resolution by this Court of this uncertainty would significantly aid to the possible resolution and settlement of these cases, and the instant matter, which is the vanguard of a wave of savings and loan litigation, presents an important opportunity for this Court to address the settlement rights of the FDIC and its opponents in anticipation of the wave washing up on the appellate shore.

The legal newspaper, "Legal Times", reported on November 19, 1990, Vol. XIII, No. 25, that, according to John Beaty, an assistant general counsel at the FDIC, the RTC expects to pursue about 140 professional-liability claims against lawyers arising from the collapse of financial institutions. The newspaper's reporter stated, "Beaty's projection is the most dramatic indication yet not only of just how vulnerable lawyers are but also of the sheer volume of litigation coming down the pike."

Without a decision of this question the settlement of many of these cases could prove to be difficult if not impossible, and the handling of the inevitable appeals from lawsuits going to judgment can be greatly simplified by a decision of this question by this Court.

Further, a decision of this question is important because the FDIC, as a federal agency, should not be allowed, as a matter of federal law, to settle cases in a manner which prejudices the rights of private non-settling litigants. This Court has not previously considered this question, but it should do so now to provide clear direction to federal courts which routinely consider settlements in lawsuits brought by federal agencies involving purely state law claims or mixed federal and state law claims.

This Court should review this question so that the Court can establish, as a matter of uniform federal law, that lawsuits brought by federal agencies, which are deemed by statute or by federal common law to present federal questions, should not be settled so as to prejudice non-settlors.

Further, this Court should decide this question because the Fifth Circuit's opinion is in plain conflict with the Louisiana Supreme Court, to the prejudice of petitioners John A. Mmahat and the law firm of Mmahat & Duffy.

Petitioners, therefore, seek redress from this Honorable Court on this important federal issue, and petitioners respectfully aver that this Court should decide this question so as to do justice between the parties to the instant lawsuit.

The question presented for review is a federal question because civil actions to which the Federal Savings &

Loan Insurance Corporation is a party are deemed by Congress to arise under the laws of the United States. 12 U.S.C.A. §1730(k)(1) (West, 1990).[2] The FDIC also takes the position that federal law governs FDIC litigation. The FDIC, in its appellee brief to the Fifth Circuit, cited in support of this proposition the cases of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), United States v. Little Lake

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2. 12 U.S.C. §1730 was repealed by §407 of the Financial Institution Reform, Recovery and Enforcement Act of 1989, ("FIRREA"), P.L. 101-73, 103 Stat. 363. However, FIRREA contains a savings provision, §401(f), 103 Stat. 356, for actions commenced by the FSLIC.

Misere Land Co., Inc., 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973), United States v. Kimbell Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), FDIC v. Lattimore Land Corp. 656 F.2d 139 (5th Cir. 1981), and others, and petitioners concur in the citation of these authorities for this proposition.

But the result reached by the District Court and the Fifth Circuit is in conflict with Louisiana law as expressed by the court of last resort for Louisiana, the Louisiana Supreme Court. Louisiana's comparative negligence system[3] requires that judgments to plaintiffs are to be reduced by the percentage of fault attributable to settling defendants.[4]

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3. La. Civil Code Articles 2323 and 2324 (West, 1990).

4. La. Civil Code Articles 1803 and 1804 (West, 1990); Wall v. American Employers Insurance Company, 386 So.2d 79 (La. 1980).

Non-settlors are therefore entitled to a jury finding on the negligence vel non of settlors, and failure to submit to the jury the question of the negligence vel non of settlors is error. Lemire v. New Orleans Public Service Co. 458 So.2d 1308 (La. 1984); Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987).

In the lawsuit at bar, petitioners, John A. Mmahat and Mmahat and Duffy, were substantially prejudiced by the District Court's denial of their right to have the jury apportion negligence to the settling defendants as well as to non-settling defendants, and by the District Court's entry of judgment without a reduction of the judgment by reason of the FDIC's prior settlements.

Petitioners were also prejudiced by the Fifth Circuit's order that the

judgment should be reduced dollar-for-dollar, in the amount of the FDIC's settlements, rather than by the percentages of negligence of the settling defendants. The Fifth Circuit found overlapping liability between petitioners, as cast in the judgment, and settlors, which liability was released by the payment of certain sums in settlement. Because of the overlapping liability, the Fifth Circuit ordered a dollar-for-dollar reduction of the judgment, to be measured by the dollar amounts of the settlements.

The Fifth Circuit and the District Court are both wrong in their holdings because the ultimate result is an unfair and disproportionate shifting of liability for the FDIC's damages to petitioners, and because this result is clearly contrary to Louisiana law.

A disproportionate share of liability has been shifted to petitioners because the FDIC's settlements, while representing a large percentage of the available insurance proceeds, constitute only a small fraction of the ultimate liability. Even the maximum reduction under the Fifth Circuit's order of the thirty-five million dollar judgment will still leave petitioners liable for more than thirty million dollars!

The amounts paid in settlement are therefore proportionately far less than the settlors' fair share of negligence and liability, since the settlements were limited by applicable insurance coverage limits far less than the FDIC's damages. The settlors paid almost all that was available to pay under the insurance policies, but these amounts do not begin to equal the FDIC's damages.

This is particularly true in regard to Gulf's officers and directors, who were the primary targets of the lawsuit before their settlement.

Therefore, if petitioners' right to an apportionment of negligence from the jury had been enforced, a much greater reduction of the judgment than a dollar-for-dollar reduction probably would have been effected. The wide disparity between the high amount of damages and the low amount of available insurance results in a severe prejudice to petitioners because there is a great risk that the settlement amounts do not fairly reflect the share of damages which otherwise would have been borne by the settlors. Since it is likely that the settlors bought their freedom cheaply, petitioners have unfairly been saddled with a disproportionate share of the damages.

This result could have been avoided if either the District Court or the Fifth Circuit had enforced petitioners' rights to a reduction of the judgment by shares of negligence. But they did not, and their failure to do so is in clear conflict with the law of the Louisiana as expressed in the statutes and cases cited above, and to petitioners' substantial detriment. Petitioners' rights to secure a greater and fairer reduction of the judgment in amounts equal to the proportionate negligence of the settlors should be enforced so as to comply with Louisiana law and to avoid the unfair shifting of liability to petitioners.

In order to right this wrong and to resolve the conflict between the Court of Appeals for the Fifth Circuit and the Louisiana Supreme Court, this Court should grant certiorari to decide the question

presented for review by petitioners. In deciding this question, this Court has the opportunity to set a course for federal courts to follow and to establish an important and much-needed uniform federal rule that federal courts should not permit the FDIC to settle claims in a manner which acts to the prejudice of non-settlors. The establishment of this rule takes on added importance because of FDIC's announcement that it will continue to pursue professional liability insurers in an attempt to reduce its losses, many of which losses are totally unrelated to professional malpractice.

Petitioners, John A. Mmahat and Mmahat & Duffy, pray, therefore, that this Court grant certiorari and decide this question presented for review.

II.

THE FDIC SHOULD NOT BE EXEMPT FROM THE REQUIREMENT OF PROXIMATE CAUSE IN A NEGLIGENCE CASE, AND THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THIS ERROR AND/OR TO ESTABLISH THIS RULE AS A MATTER OF UNIFORM FEDERAL LAW

The FDIC was exempted from the essential element of proximate cause in this tort case. Petitioners aver that this error merits this Court's review because of the glaring conflict between this holding and the law of other circuits, the law of Louisiana and fundamental precepts of American tort law, because of the threat that the error will be repeated in the hundreds of pending cases currently being pursued by the FDIC, and because the error prejudices petitioners.

The claim brought by the FDIC against John A. Mmahat and Mmahat & Duffy is a legal malpractice claim arising in tort. Tort claims, as a matter of hornbook law, require proximate cause as an

element.

> "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause,' or 'legal cause.'" Prosser, Law of Torts, §41, 4th Ed., 1971 (West).

Judgment was entered in this case on a jury verdict silent as to proximate causation. John A. Mmahat and Mmahat & Duffy timely objected to the District Court's failure to give the jury interrogatories on proximate causation.[5]

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5. See Appendix E, which contains the jury interrogatory submitted by petitioners and an excerpt of the trial proceedings showing that the District Court's jury interrogatories did not contain a question on proximate cause, and showing that John A. Mmahat and Mmahat & Duffy timely objected to the interrogatories. The reference in the appeal record to this excerpt is Doc. No. 968, Vol. 47, pp. 1638-40, 1648.

The District Court made no independent finding with respect to causation.

This is clear error, and the judgment should be reversed. Liability in tort requires causation, and the entry of judgment without causation is contrary to established tort law, to the law of Louisiana and to the law of the Fifth Circuit.[6]

An essential element of a Louisiana legal malpractice case is a showing that the attorney's negligence

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6. Cf. Prosser, Law of Torts, §§41 et seq., 4th Ed., 1971 (West); In Re Air Crash Disaster near New Orleans, La. on July 9, 1982, 764 F.2d 1084, 1092 (5th Cir. 1985); Andrus v. Trailers Unlimited, Etc., 647 F.2d 556, 558 (5th Cir. 1981); Thomas v. Express Boat Company, Inc., 759 F.2d 444, 448 (5th Cir. 1985); Perry v. Chevron, U.S.A., Inc., 893 F.2d 682, 683 (5th Cir. 1990).

caused the alleged damages.[7]

> "It is not enough that the defendant was negligent. An attorney is liable for the harm caused by his negligence only if the client proves that such negligence is a proximate cause of that harm." Meyers v. Imperial Casualty Indemnity Company, 451 So.2d 649 at 654 (La.App. 3rd Cir. 1984).

Judgment without causation in tort cases generally, and in a Louisiana legal malpractice case specifically, is clear error under principles of tort law generally, and under Louisiana tort law

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7. Jenkins v. St. Paul Fire & Marine Insurance Company, 422 So.2d 1109 (La. 1982); Executive Recruitment v. Guste, et al., 533 So.2d 129 (La.App. 4th Cir. 1988), writ denied, 535 So.2d 742 (La. 1989); Braud v. New England Ins. Co., 534 So.2d 13 (La.App. 4th Cir. 1988); Dier v. Hamilton, 501 So.2d 1059 (La.App. 2nd Cir. 1987); Evans v. Detweiler, 466 So.2d 800 (La.App. 4th Cir. 1985); Lowe v. Continental Insurance Company, 437 So.2d 925 (La.App. 2nd Cir. 1983), writ denied 442 So.2d 460 (La. 1983), cert. denied 466. U.S. 942, 104 S.Ct. 1924, 80 L.Ed. 2d 470 (1984).

and the law of the Fifth Circuit specifically.

The review and correction of this error will also serve to resolve the conflict between the Court of Appeal for the Fifth Circuit and previous Fifth Circuit decisions and virtually all other federal courts of appeal.[8]

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8. In re N 500L Cases, 691 F.2d 15 at 28 (1st Cir. 1982); Johnson v. New York, N.H. & H.R. Co., 194 F.2d 194 at 197 (2nd Cir. 1952), vacated on other grounds, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed.77 (1952); U. S. v. Moran Towing & Transp. Co., 409 F.2d 961 at 963 (4th Cir. 1969); Gideon v. Johns-Mansville Sales Corp., 761 F.2d 1129 (5th Cir. 1985); Hinton v. Dixie Ohio Exp. Co., 188 F.2d 121 at 126 (6th Cir. 1951); Albers v. Church of the Nazarene, 698 F.2d 852 at 857 (7th Cir. 1983); Fields v. Ross Oil Company, 250 F.2d 498 at 502 (8th Cir. 1957); Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 at 1092 (9th Cir. 1983), cert. denied, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); Key v. Liquid Energy Corp., 906 F.2d 500 at 505 (10th Cir. 1990); Logsdon v. Baker, 517 F.2d 174 at 175 (D.C.Cir. 1975).

This Honorable Court should review and correct this error before the federal court floodgates are opened to a torrent of FDIC judgments based on this same error. Without correction, the FDIC will certainly use the result of this case in the multitude of cases which it is currently pursuing nationwide.

The tort principle of proximate cause, overridden by the district court and the Court of Appeals for the Fifth Circuit, has virtually universal acceptance in United States courts, and the magnitude of the potential harm from this decision, therefore, is also universal. The FDIC should not be exempt from the essential tort element of proximate cause, and this Court should review this case to protect this axiom of American tort law for the benefit of litigants in pending and anticipated FDIC lawsuits.

John A. Mmahat and Mmahat & Duffy aver that the judgment against them is fatally flawed since there was no determination of causation. As a matter of uniform federal law, the FDIC should not be exempt from this fundamental tort element. Because judgment was entered without a causation finding, this Court should grant certiorari to resolve the question presented for review, to set aside the judgments of the district court and of the Court of Appeals for the Fifth Circuit, and to remand the matter to the District Court for a new trial.

III.

THIS COURT SHOULD CLARIFY ITS DECISION IN BEECH AIRCRAFT CORPORATION V. RAINEY TO INSTRUCT FEDERAL COURTS ON WHAT CONSTITUTES TRUSTWORTHINESS AND TO RESOLVE THE REFUSAL OF THE FIFTH CIRCUIT TO APPLY RAINEY IN ITS DECISION

The District Court allowed the FDIC to introduce documents, which petitioners refer to as "Privileged Information Sheets," into evidence at trial despite petitioners' objections. These documents were prepared by FHLBB examiners and contained speculative conclusions by the examiners as to the alleged excessiveness of legal fees paid by Gulf Federal to Mmahat & Duffy.

Petitioners contend that these documents did not satisfy the "trustworthiness" test of Federal Rule of Evidence 803(8)(c) and aver that this Court should again consider Rule 803(8)(c) so as to articulate guidelines on

"trustworthiness," particularly in the instance when the proponent of the document is the federal agency which created the document.

This admissibility of the "Privileged Information Sheets" was a critical and hotly disputed issue in the trial. In the documents, bank examiners expressed conclusions that Mmahat & Duffy earned excessive fees. This evidence went to the heart of the FDIC's assertion that John A. Mmahat breached a fiduciary duty to Gulf by allegedly generating legal fees through commercial lending. The FDIC maintained this assertion even though the FDIC stipulated that the fees charged were in accordance with custom of the legal community and even though the fee income in question was reported in the open examination report as per regulation.

The admissibility of the documents and the conclusions in them was also hotly disputed because the "Privileged Information Sheets" are kept secret by the FHLBB, and their existence was unknown until pre-trial discovery, even though they are prepared as an adjunct to open examination reports which, in contrast, are given to the institution being examined. One consequence of the secretive treatment of these documents is that the institution's management is not given the opportunity to respond to the "Privileged Information Sheets," which contrasts with the opportunity provided management to respond to the open examination report.

This issue was raised on appeal to the Fifth Circuit, and is discussed at 907 F.2d 551. Petitioners aver that the Fifth Circuit's ruling on this issue is

wrong and not in accord with this Court's recent opinion in Beech Aircraft v. Rainey, et al., 488 U.S. 153, 109 S. Ct. 439, 102 L.Ed.2d 445 (1988).

This Court, in Rainey, resolved conflicts in the interpretation of Federal Rule of Evidence 803(8)(c). In so ruling, the Court described the "obligation" of the trial judge to determine whether or not the document sought to be admitted is "trustworthy". 109 S.Ct. at 448. The Court noted that the Advisory Committee report lists a "nonexclusive" set of four factors. Significantly, one of those factors is an inquiry as to bias when it appears that a document has been prepared with an eye toward litigation!

However, this Court, in deciding Rainey, did not specifically have to review for "trustworthiness" since it was not raised by the parties. Further, this

Court, in deciding Rainey, did not have to grapple with the thornier problem, presented by the instant matter, of whether federal agency documents can be considered "trustworthy" when they have been created by a federal agency and then are sought to be used by the same federal agency for the purpose of advancing the agency's interests in a lawsuit.

A federal agency as a litigant will tend, as any other litigant, to justify its own actions and support its legal and economic position in a civil lawsuit by the use of its own documents. A federal agency as litigant, however, should not be immune from the suspicion of untrustworthiness faced by any other litigant proferring its own documents in support of its cause.

Since a federal agency as a party litigant has a conflict of interest

between objectivity and the protection of its own interests, agency documents proferred as evidence in litigation involving that agency merit this Court's special scrutiny as to their "trustworthiness" as discussed in Rainey.

This problem is heightened in the circumstance when the document contains, and is used to disclose, the conclusionary statements of the agency's employees about opposing litigants, is previously held secret by the agency without the benefit of timely rebuttal, and is revealed only when the agency engages in litigation.

This Court can expect to see this question presented many times in the future because of the quantum of savings and loan litigation. It is reasonable to assume that "Privileged Information Sheets" exist for every savings and loan institution from which litigation may

spring, since the FHLBB's Manual of Internal Procedure calls for the preparation of this document with every examination. It is also reasonable to assume that these documents, as in the instant matter, serve as repositories for derogatory comments regarding individual officers, directors and persons or entities rendering services to the institution, such as attorneys, and that the documents, filed away under lock and key without opportunity for rebuttal, will be unveiled and used when convenient against officers, directors and other chosen targets of the FDIC.

Both banks and savings and loans were examined in this manner, but, in the adoption of this procedure the federal rule-making process under the Administrative Procedures Act was not observed. As a result, neither savings and

loan institution nor bank officials knew, or know now, that these secret dossiers exist, so this Court will see more and more cases involving these covert dossiers as defendants discover their existence and seek to rebut their contents.

Rule 803(8)(c), as interpreted by this Court in Rainey, is an important evidentiary rule which will become even more important, particularly as to "trustworthiness," as the FDIC becomes more aggressive in pursuing lawsuits against officers, directors and other persons or entities rendering services to failed financial institutions. This is illustrated by the fact that, in the short time since Rainey was decided, it has been a deciding, or at least an important, factor in some 80 decisions of federal courts in various federal circuits.

Courts of Appeal are in conflict in applying the Rainey decision. Many cases have been remanded back to the District Court with instructions to apply a "trustworthiness" test to the government document. One decision from the Eleventh Circuit, Hines v. Brandon Steel, Inc., 886 F.2d 299 (11th Cir. 1989), gives detailed instructions on the criteria for the application of Rainey by listing what Court decisions over the years have said about "trustworthiness."

However, the Fifth Circuit decision in the instant case is in conflict with other Courts of Appeal and with this Court. The Fifth Circuit did not apply Rainey, nor did it discharge its obligation to address the "trustworthiness" of the "Privileged Information Sheets."

If "trustworthiness" is required for the admissibility of a federal agency document normally, it is absolutely indispensable when the agency is a party litigant. Any discussion of admissibility in this circumstance without a consideration of "trustworthiness" is flawed on its face.

This Court should grant certiorari to review this question and to consider the special problem of the "trustworthiness" of agency documents proferred by that agency into evidence as a litigant. The Court should also consider the question of whether a "trustworthiness" analysis is indispensable in this circumstance and, if so, whether to correct the error of the Fifth Circuit and to resolve the conflict between the Fifth Circuit and other Courts of Appeal on the necessity of such an analysis.

IV.

THE FIFTH CIRCUIT IMPROPERLY APPLIED 11 U.S.C. §523(a)(4) TO BAR JOHN A. MMAHAT'S DISCHARGE IN BANKRUPTCY, CONTRARY TO DECISIONS OF THE COURTS OF APPEAL AND THIS COURT

The Fifth Circuit and the District Court held that the 35 million dollar judgment against John A. Mmahat was non-dischargeable in bankruptcy. Petitioner John A. Mmahat avers this holding is contrary to a long line of jurisprudence in the Fifth Circuit and in this Court.

The Fifth Circuit decision says that the malpractice found is excepted from discharge under 11 U.S.C. §523(a)(4) because it was an act of "...defalcation while acting in a fiduciary capacity." Specifically, the Fifth Circuit's words were that, "Mmahat..enriched himself at the cost of Gulf Federal's assets." 907 F.2d at 550. (This contention originated

in the secret Privileged Information Sheets prepared by FHLBB examiners, the admissibility of which is placed at issue in section III. of this petition.) To support this conclusion, the Fifth Circuit decision in the instant matter cites only the case of Carey Lumber Co. v. Bell, 615 F.2d 370, 376 (5th Cir. 1980). No analysis is made to relate Carey to the issues, nor does the Fifth Circuit's opinion articulate how Carey is supposed to apply.

But Carey is inapposite. It is a "trust fund" case in which a specific trust fund, previously created by statute, was violated by the debtor Bell who used the trust fund money elsewhere. No trust fund exists in the instant matter.

The Fifth Circuit's opinion does not discuss the applicability of the authority cited by petitioner, Matter of

Boyle (Boyle v. Abilene Lumber, Inc.), 819 F.2d 583 (5th Cir. 1987)> which analyzes the history and application of 11 U.S.C. §523(a)(4), and states, in footnote 9, that, "...'defalcation' is normally defined as specifically applicable to trust funds...". 819 F.2d at 587.

The instant Fifth Circuit decision is contrary to a prior Fifth Circuit decision, Matter of Angelle, 610 F.2d 1335 (5th Cir. 1980), and to decisions of this Court, Upshur v. Briscoe, 138 U.S. 365, 11 S.Ct. 313, 34 L.Ed. 931 (1891) and Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed.2d 393 (1934).

The non-dischargeability holding is also contrary to the legal malpractice law of Louisiana. Mmahat allegedly gave legal advice to the other members of the

Board of Directors of Gulf Federal by the act of signing a letter, along with the other members of the Board, in reply to an examination report. Signing this letter in his capacity as a member of Gulf's Board of Directors was required by federal regulations since it was the official reply of the Board of Directors to the Supervisory Agent's examination letter. John A. Mmahat was not an expert on regulatory affairs, did not intend to act in an attorney-client capacity, did not intend to give "legal" advice and was not paid as an attorney. The other members of Gulf's Board did not ask for any such advice, did not know they had received any advice, and did not pay for any advice. As in the case of Grand Isle Campsites, Inc. v. Cheek, et al., 202 So.2d 350 (La. 1972), not only was there no express agreement between the parties, the

directors were not even aware that this event constituted "legal advice." The directors were, however, knowledgeable of an agreement they had with a Washington, D.C., law firm to give regulatory advice.

Therefore, under Louisiana law, there was no malpractice which could rise to the status of a defalcation. The conclusion that John A. Mmahat "..enriched himself at the cost of Gulf Federal's assets" does not equate or analogize to the "trust fund" involved in the Carey decision. The Fifth Circuit's decision is contrary to precedent, and if enforced, would impermissibly expand the exception to discharge created by 11 U.S.C. §523(a)(4) and could bar from discharge simple acts or omissions of malpractice by an attorney, a doctor, a CPA or any other professional.

Therefore, petitioner John A. Mmahat prays that this Court grant certiorari to consider this important question of bankruptcy law.

Respectfully submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

BY: _____

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_____

JOHN A. MMAHAT, PRO SE,
Defendant/Appellant/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on all counsel of record, United States Mail, postage prepaid and properly addressed on this _____ day of _____, 1990.

_____

RICHARD T. SIMMONS, JR.

_____

JOHN A. MMAHAT, PRO SE

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION	CIVIL ACTION
VERSUS	NO. 86-5160
JOHN A. MMAHAT, ET AL	SECTION "A"

J U D G M E N T

In light of the jury verdict entered herein and the Court's Orders and Reasons, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, the Federal Savings and Loan Insurance Co. and against defendants John A. Mmahat and Mmahat & Duffy in solido in the amount of $35 million, with interest to run from date of judicial demand and defendants to bear all costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in

favor of New England Insurance Co. dismissing all claims against it with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of American Casualty Company, dismissing all claims against it with prejudice.

New Orleans, Louisiana, this 28th day of December, 1988.

S/D.P. Descant
UNITED STATES DISTRICT CLERK
CHIEF DEPUTY CLERK

S/Charles Schwartz, Jr.
APPROVED AS TO FORM

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION	CIVIL ACTION
VERSUS	NO. 86-5160 and consolidated cases
JOHN A. MMAHAT, ET AL	SECTION "A"
	This Order & Reasons pertains to 87-1630

ORDER & REASONS REGARDING DISCHARGEABILITY

This litigation has been brought by FSLIC as receiver of Gulf Federal Savings Bank to recovery damages incurred by Gulf as a result of alleged wrongful acts by Gulf's former officers, directors and lawyers,[1] including legal malpractice claims against Gulf's former lawyers, the

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1. FSLIC's claims against the officers, directors and their insurers were settled prior to trial.

firm of Mmahat & Duffy and John Mmahat individually. These claims arose out of alleged malpractice and breach of fiduciary by Mmahat and his firm in respect of their advice regarding federal lending limits set forth in the loans to one borrower regulation. The jury returned a verdict in response to special interrogatories in favor of FSLIC and against both defendants in the amount of $35 million, and the Court entered a judgment based upon the verdict.

Pursuant to the stipulation entered into by the parties on December 14, 1988, the Court took under submission certain issues, among which is the question whether the jury's award in favor of plaintiff FSLIC and against John A. Mmahat in the amount of $35 million is dischargeable in bankruptcy proceedings

filed by defendant Mmahat.[2] The Court was also authorized by stipulation to make such findings of fact and conclusions of law as are necessary to resolve these issues, based upon the evidence in the record and the jury's findings and without taking any further evidence.[3]

Accordingly, having considered the evidence, the parties' memoranda and the applicable law, the Court rules as follows. To the extent of any of the following findings of fact constitute

---

2. The Court also took under submission certain issues of insurance coverage, which were addressed in separately issued Orders & Reasons.

3. As a result of this stipulation, the jury was dismissed from further participation in this cause of action.

conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are so adopted.

Findings of Fact

The original complaint in Civil Action 86-5160 was filed on November 21, 1986. On January 30, 1987, John A. Mmahat filed a voluntary petition for bankruptcy, assigned Bankruptcy Court E.D. La. No. 87-00447. After filing a proof of claim in Mmahat's bankruptcy, FSLIC filed, on April 9, 1987, a petition to determine the dischargeability of the claims made by FSLIC against Mmahat in the complaint initiating this action. Also on April 9, 1987, FSLIC moved for relief from the automatic stay and moved to withdraw the reference of its complaint to determine dischargeability from Bankruptcy Court to District Court. At that time, the motion

to withdraw the reference and the petition to determine dischargeability were assigned District Court Civil Action Number 87-1630. On May 27, 1987, the stay was lifted and the reference of the complaint to determine dischargeability withdrawn to District Court. On June 3, 1987, FSLIC's complaint to determine dischargeability (Civil Action No. 87-1630) was consolidated with Civil Action No. 86-5160.

Upon trial of the main demand in Civil Action No. 86-5160, the jury found in response to special interrogatories that an attorney-client relationship existed between Mmahat and Gulf with respect to the loans to one borrower regulation. The jury also found that Mmahat violated his fiduciary responsibility to Gulf in connection with the loans to one borrower regulation. The

Court concurs in these findings: It is patently clear from the record that the jury's findings were correct almost to the point of the Court directing a verdict in FSLIC's favor with respect to these questions.

The record is also clear that Mmahat's violations of his fiduciary responsibility to Gulf with respect to the loans to one borrower regulation continued during the period from 1982 to the end of 1984. These breaches of fiduciary duty were motivated by Mmahat's desire to continue his control over Gulf and the enormous fees which he and his law firm were able to reap as a result of his defalcation.[4]

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4. Proportionately, the law firm of Mmahat & Duffy had little other business than Gulf, and Mmahat personally obtained, by far, the greatest proportion of the profits of the law firm.

Conclusions of Law

> 11 U.S.C. § 523(a) provides in pertinent part:
>
> A discharge under section 727, 1141, 1128(a), 1128(b), or 1328(b) of this title does not discharge an individual from any debt - ...
>
> (4) for fraud or defalcation while acting in a fiduciary capacity.

The attorney-client relationship gives rise to a fiduciary relationship. See Plaquemines Parish Comm'n Council v. Delta Dev. Co., 502 So.2d 1034, 1040 (La. 1987).

In light of the concurrent findings of the jury and this Court that an attorney-client and fiduciary relationship existed, Mmahat's wrongful conduct falls within 11 U.S.C. § 523(a)(4). Where a defalcation occurs in the context of a fiduciary relationship, a debt resulting from the defalcation is not dischargeable in bankruptcy. See Carey Lumber Co. v. Bell, 615 F.2d 370, 375 (5th Cir. 1989); In re Codias, 78 B.R. 344, 346 (S.D. Fla.

1987); Janikowski v. Janikowski, 60 B.R. 784, 789 (N.D. Ill. 1986); In re Gelman, 47 B.R. 735 (S.D. Fla. 1985).

Accordingly, the Court concludes that the judgment rendered herein against John A. Mmahat in Civil Action 86-5160 for malpractice in violation of the loans to one borrower regulation is nondischargeable in bankruptcy. The Clerk of Court is hereby directed to close Civil Action 87-1630 and the matter is hereby remanded to the Bankruptcy Court for further proceedings consistent with this Order & Reasons, including, but not limited to, the entry of an Order with respect to the nondischargeability of the debt at issue in Civil Action 86-5160 with respect to any final adjudication of the John A. Mmahat bankrupt estate.

New Orleans, Louisiana, this 28th day of December, 1988.

S/Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

Appeal from the
United States District Court
For the Eastern District of Louisiana

Before GARZA, SMITH and BARKSDALE,
Circuit Judges.

GARZA, Circuit Judge:

General counsel for a now-defunct savings and loan, and his law firm, were found liable for legal malpractice through a jury verdict for $35 million. The district court held that their conduct was excluded from their malpractice insurance coverage. 97 B.R. 293. Because the law firm was adjudged dishonest by the jury, we AFFIRM the exclusion from coverage, but we REMAND this cause to the district court to give credit for amounts paid by settling defendants before trial.

FACTS

John Mmahat, a partner in Mmahat & Duffy, was general counsel for Gulf Federal, a federally-chartered savings and

loan, for over twenty years. He even served as chairman of the board for six years in the early 1980s. Gulf Federal began to sustain losses in the residential lending market, and by 1982 was insolvent. Because the Garn-St. Germain Depository Institutions Act of 1982 let S & L's lend more freely and widely, Gulf Federal began making commercial loans rather than merge with a more sound institution.

About this time, the Federal Home Loan Bank Board (the "FHLBB") restricted the amount any S & L could lend to any one borrower. 12 C.F.R. § 563.9-3. An S & L could lend only a certain percentage of its net worth or withdrawable accounts under these "loans to one borrower" or LTOB restrictions. Gulf Federal's LTOB

limit was $200,000 (later $500,000).[1] But Gulf Federal, under Mmahat's direction, violated the LTOB regulations on a regular basis, even after warnings by the FHLBB. In fact, Mmahat specifically instructed the board of directors "never [to] turn a loan down because it is over our loans to one customer limits."

Those commercial loans followed the path of many of their brothers in the mid-1980s, and Gulf Federal fell under the weight of the defaults. The FDIC sued Mmahat for malpractice in advising Gulf

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1. The "one borrower" definition includes any person who owns more than 10% of a corporate borrower. For example, if Individual A borrowed $100,000, and B Corp (of which A owned 15%) borrowed $100,000, then A would have an aggregate of $200,000 in loans.

Federal to make all those loans in violation of the LTOB regulations.[2] At trial, the evidence showed that Mmahat had encouraged the loans so that his law firm could make fees on the closings. As a result, the jury found Mmahat and his firm liable for $35 million in bad loans.[3]

---

2. FDIC is successor to FSLIC in this action by virtue of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 1983 (Aug. 9, 1989). For ease of understanding, we will use "FDIC" to denote all federal regulators involved here.

3. The $35 million represents seven specific loans that were made in violation of the LTOB restrictions, and whose default contributed to the collapse of Gulf Federal.

Though the jury found in specific interrogatories that Mmahat & Duffy had committed malpractice and breached their fiduciary duty to Gulf Federal, there was no evidence that anyone at the firm, other than Mmahat, had done any culpable acts.

The court below found, however, that FDIC could not recovery from New England Insurance Co. ("New England"), Mmahat & Duffy's insurance carrier, as their acts fell under a "dishonesty exclusion," which read:

III. EXCLUSION:

> The policy shall not indemnify the Insured for any damages or claim expenses as the result of any claim:
>
> A- that results in a final adjudication that any Insured has

> committed dishonest, fraudulent or malicious act, error, omission or personal injury with deliberate purpose and intent. Nothing contained in the foregoing shall exclude coverage to any other Insured who is not so adjudged to have committed any such act, error, omission or personal injury as described above.

Claiming that Mmahat & Duffy was not "dishonest," and that the policy should cover its vicarious liability, FDIC brought this appeal. Mmahat and Mmahat & Duffy also appeal the jury's liability verdict.

DISCUSSION

I. Appeal of Liability

Mmahat and Mmahat & Duffy appeal - on

multiple points---the jury's finding of liability for malpractice and breach of fiduciary duty.

A. Contribution of Settling Defendants

Several officers and directors of Gulf Federal settled with the FDIC at or before trial for some $1.9 million, but the jury was not given an interrogatory to determine what portion of ultimate fault should be attributed to them. Mmahat complains that was error; under Louisiana law he is entitled to a proportionate reduction or his liability by the percentage of fault attributed to the settlors. La. Civ. Code Ann. art. 1804 (West 1988); Nance v. Gulf Oil Corp., 817 F.2d 1176, 1180-81 (5th Cir. 1987).

The FDIC concedes that Mmahat is entitled to some credit for the amounts paid by the settling defendants, but since "[f]ederal law governs the rights of the

FSLIC," FDIC v. Lattimore Land Corp., 656 F.2d 139, 143 n. 6 (5th Cir. 1981), they urge us to adopt a federal common law rule to govern this type of case and insure uniformity in similar suits tried nationwide. Under the FDIC's proposed pro tanto rule, Mmahat would get a dollar-for-dollar credit for any amount paid by the settling defendants.[4] The Second Circuit

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4. For example, assuming A and B are co-defendants, under a pro tanto rule, if A settled for $1000 before trial, then B would get a $1000 credit on whatever amount the jury assessed against him. Under Louisiana's proportionate reduction rule, if $50,000 were assessed against B, and A were found to be 25% at fault, B would get a $12,500 credit (25% X $50,000). But because A and the plaintiff had settled, A would not be liable for more in damages.

has adopted the pro tanto approach where interests of uniformity in a federal case mandate application of a federal common law. Singer v. Olympia Brewing Co., 878 F.2d 596, 600 (2d Cir. 1989), cert denied, ---U.S.---, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990).

Mmahat had the burden at trial of proving the settlors' share of fault, but the court below found that there was insufficient evidence in the record to permit a finding of proportionate fault. This finding makes the proportionate reduction v. pro tanto inquire moot, so we will not resolve it here, but we are left with a question of double recovery. Because the money paid by the settling defendants and recovery from Mmahat overlap, we feel Mmahat should get credit for the amount paid. We therefore remand

this issue to the district court to determine what portion of the amount paid by the settlors is attributable to the seven loans Mmahat was sued on, and give Mmahat a dollar-for-dollar credit on that amount.

B. Discharge in Bankruptcy

Mmahat filed for bankruptcy protection after this suit was filed but before trial; the district court lifted the automatic stay and consolidated the actions. Because the jury found that Mmahat had breached a fiduciary duty, the court found that the judgment was not dischargeable because of his bankruptcy. The bankruptcy code excepts from discharge acts committed by "fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4). Mmahat argues that the exception should not apply since there was no "acquisition or use of property

that is not the debtor's." Boyle v. Abilene Lumber, Inc., 819 F.2d 583, 588 (5th Cir. 1987).

FDIC argues that there was defalcation: Mmahat urged Gulf Federal to make improper loans so that he could earn fees. Mmahat thereby enriched himself at the cost of Gulf Federal's assets. Carey Lumber Co. v. Bell, 615 F.2d 370, 376 (5th Cir. 1980). We agree. Mmahat cannot discharge this judgment in bankruptcy.

C. Prescription

Mmahat and New England argue that FDIC's claim was prescribed by Louisiana law before FDIC took over Gulf Federal as receiver. Torts such as malpractice are covered by a one year limitations period in Louisiana. La. Civ. Code Ann. art. 3492. Taken alone, that period seems to

bar the claims today.[5] But in a legal malpractice action, the doctrine of contra non valentem tolls the limitations period until the attorney-client relationship ends. Montgomery v. Jack, 556 So.2d 267 (La. App. 2d Cir. 1990). In this case, the relationship ended when Gulf Federal went into receivership.

Mmahat argues that contra non valentem did not apply because he did not conceal facts which would have put the FDIC on notice of the malpractice. But

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5. The FDIC gets the benefit of an extended limitations period which begins to run from the time it takes over as receiver. 28 U.S.C. § 2415. Because we find that limitations here was tolled until FDIC came in as receiver, we need not address whether the FDIC's extended period would have revived an already-prescribed claim.

FDIC did not own, nor could it enforce the claims until it took over as receiver; no amount of notice would have allowed FDIC to sue before that time. Further, the only court to address this issue held that when the government acquires a cause of action from an institution, limitations begins to run as figured from the perspective of the institution, not the regulators. FDIC v. Buttram, 590 F.Supp. 251, 254-55, (N.D. Ala. 1984). And we agree with the Buttram court.

Because we find that contra non valentem tolled the limitations clock on this action until the attorney-client relationship ended at receivership, we affirm on this point. This action was not prescribed when FDIC stepped in.

D. Conduct of Trial

The trial court allowed several witnesses to give opinion testimony even

though FDIC's pre-trial order listed them as fact, not expert, witnesses. Mmahat argues this was an abuse of discretion, but we do not agree. Fed.R.Evid. 701 allows even lay witnesses to give opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." It is clearly within the trial court's discretion to allow the witnesses to give opinion testimony.

Mmahat also argues that the court below erred in admitting into evidence certain FHLBB examination reports, prepared without Gulf Federal's knowledge before it went into receivership. Specifically, the documents contained hearsay statements from Joseph Mmahat--John's brother--opining that Mmahat encouraged improper loans so his law firm

could make fees. The document itself was admissible as a public record, but Fed.R.Evid. 805 demands that all hearsay within a document have its own exception. Because Joseph Mmahat was himself still a defendant at the time the document was introduced into evidence, it was clearly admissible as a non-hearsay admission under Fed.R.Evid. 801(d)(2)(A).[6]

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6. FDIC argues here that the documents are admissible as factual findings from an investigation made pursuant to authority granted by law. Fed.R.Evid. 803(8)(C). That exception may well apply to the documents themselves, but it would not solve the "hearsay within hearsay" problem, were that problem not already solved. Though factual findings are admitted by Fed.R.Evid. 803(8)(c), hearsay statements contained in the report are not. McClure v. Mexia Indep. School Dist., 750 F.2d 396, 401-02 (5th Cir. 1985). For a discussion of the admissibility of conclusory reports and construction of the term "factual finding," See, McCormick on Evidence, § 316 (3d ed. 1984).

E. Counter-Claims

Mmahat brought a series of state law counter-claims against FDIC for negligent regulation. In essence, Mmahat claims the FDIC should be liable for failure to put Gulf Federal into receivership sooner. the district court dismissed the claims because they addressed discretionary functions and so were excepted from the Federal Torts Claims Act ("FTCA"). 28 U.S.C. §2671 et seq. That exception to the FTCA reads, in pertinent part:

> The provisions of [the FTCA] shall not apply to-
> (a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a).

Mmahat argues that the discretionary function exception does not apply to negligent regulation of a financial institutions, and cites Gaubert v. U.S, 885 F.2d 1284 (5th Cir. 1989). In Gaubert, we held that the FHLBB could lose the protection of the exception if it went beyond discretionary acts and began day-to-day management of a financial institution. Id. at 1290. But Mmahat's reliance on Gaubert is misplaced. There, we found that over-interference can take regulators outside the discretionary function exception; here, Mmahat wants us to take the FDIC out of the exception for failure to interfere. We decline to do so, and affirm the district court on this

point.[7]

F. Legal Malpractice

Mmahat argues that there was insufficient evidence to sustain the jury's finding of legal malpractice, because there was no evidence that he gave advice specifically on the seven loans at issue in this case. We will not disturb the jury's verdict unless, considering the evidence in the light most favorable to the FDIC, the facts and inferences point so overwhelmingly to Mmahat that reasonable jurors could not have arrived

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7. Not only is Gaubert inapposite here, but is perhaps should be cited with care in any case. The Supreme Court has granted certiorari in that case, so Gaubert as we know it may not be with us long. See, U.S. v. Gaubert, ---U.S.---, 110 S.Ct. 3211, --- L.Ed.2d--- (1990).

at a verdict except in his favor. Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 268-69 (5th Cir. 1980).

Striving to meet his burden of proof on appeal, Mmahat cites examples of certain officers and directors who did not hear or follow his advice on certain specific occasions. We do not find those examples sufficient to overcome the verdict of a correctly instructed jury. We likewise reject New England's complaint that Mmahat acted not as attorney but as chairman of the board, and therefore could not have committed legal malpractice as a matter of law. The jury's verdict will stand.

G. Jury Instructions

Finally, Mmahat and the firm argue that the court below incorrectly instructed the jury as to proximate cause,

failure to mitigate damages, and the attorney-client relationship. We find that the court gave full and complete instructions on each of the issues, and defer to the district court's broad discretion to formulate a charge. U.S. v. Graves, 669 F.2d 964, 970 (5th Cir. 1982).

II. Insurance Coverage

The district court found that Mmahat had been adjudged "dishonest" when the jury found he breached his fiduciary duty to Gulf Federal, so his conduct was excluded from the New England policy's coverage. Further, the court held that since the jury also found that Mmahat & Duffy had breached its fiduciary duty, it was excluded from coverage as well. Finally, the court held that, if the policy did apply, the aggregate limits ought to be paid, and not the individual

act sum.

A. Dishonesty of the Firm

FDIC does not challenge the district court's finding of dishonesty as to Mmahat. Rather, they argue that Mmahat & Duffy cannot be held "dishonest" as they are liable only vicariously and did no culpable acts outside of Mmahat's personal participation. The policy's dishonesty exclusion has a safety hatch for "innocent co-insureds" who are "not so adjudged to have committed" a dishonest act. But this is not just an issue of vicarious liability; here the firm was adjudged dishonest: the jury found specifically that Mmahat & Duffy had breached its fiduciary duty.

In Ashland Oil, Inc. v. Miller Oil Purchasing Co., Inc., 678 F.2d 1293 (5th Cir. 1982), the president, vice-president and three managers of a company conspired

to commit an environmental tort. We held there that the conduct was excluded from insurance coverage because the conspiracy was not "the unauthorized intentional act of an individual employee," but was a "deliberate execution of a preconcerted plan, conceived in the mind of [the company] and carried out by a central nervous system of key [company] personnel." Id. at 1317. Here, though only Mmahat himself did the culpable acts, they weren't one-time, individual acts. Nor were they unauthorized. Rather, they were continuing and planned, made up a large portion of firm revenue, and were the pet of Mmahat, who was nothing if not key personnel at the firm.

The FDIC argues that acts of one player, no matter how key in the firm's structure, cannot transfer dishonesty absent something more. Rivers v. Brown,

168 So.2d 400 (La. Ct. App. 3d Cir. 1964), cert. ref'd, 247 La. 250, 170 So.2d 509 (La. 1965) (company not excluded from coverage by assault by president and major shareholder), and Baltzar v. Williams 254 So.2d 470 (La. Ct. App. 3d Cir. 1971) (town not excluded by violence of sheriff's deputy). But Mmahat's systematic and pervasive wrongdoing in this case is completely distinguishable from the one-time outbursts at issue in an assault and battery setting, such as Rivers and Baltzar.

Had FDIC not asked the jury whether Mmahat & Duffy breached its fiduciary duty to Gulf Federal, the firm would not have been "adjudged dishonest," and we might not be here today. But, as the district court correctly pointed out, FDIC "was not content to rest its case on whether Mmahat and his firm were guilty of malpractice

solely because of improper advice... Rather, [FDIC] included in its argument and evidentiary presentation to the jury the claim that Mmahat and his firm breached their fiduciary duties as lawyers because of actions taken to generate fees." We will not let FDIC undo what it has wrought.

We are now in the throes of an S & L crisis, and the final bill of failures like Gulf Federal is sure to touch us all for years to come. Mmahat and others like him played a big part in that crisis by recklessly granting commercial loans against general banking wisdom, and they are rightly being called on to pay for those errors. But worthy as the cause may be, we will not stretch this insurance policy to help pay the bill. We affirm the district court's exclusion of coverage.

B. Aggregate Coverage Limits[8]

The New England policy has a $1 million limit for single claims and a $2 million limit for aggregate claims. The district court held that the aggregate limit applied, as there were multiple instances of malpractice. New England argues that the single limit ought to

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8. This point is moot as to Mmahat and Mmahat & Duffy, whose conduct is excluded from coverage, aggregate or otherwise, as discussed above. But FDIC is currently in litigation against Peter Duffy, who, as a Mmahat & Duffy partner, may be personally liable for the firm's actions. If he is held liable, the New England policy may well apply to him as an innocent co-insured. So, since this show won't be over until the fat lady sings, we will address this issue now.

apply, as Mmahat carried out a series of related acts, which constitute a single claim under the policy.

New England cites Gregory v. Home Ins. Co., 876 F.2d 602 (7th Cir. 1989), where the single limit applied though there were multiple plaintiffs. But there the insured had done only one act--prepared a brochure and tax opinion--that had harmed many. Still, Gregory helps us by defining "related acts:" they are acts which are "logically or causally connected" Id. at 605. So, If Mmahat's opinions and advice to Gulf Federal were logically or causally connected, they were related acts and the single claim limit ought to apply.

The FDIC has maintained throughout that Mmahat gave all his LTOB advice towards one end: generate fees for his firm. New England argues that his acts

were, then, logically and causally connected and the single limit applies. But a single motive does not make a single act. Eureka Fed. S & L Ass'n v. American Cas Co. of Reading, Pa., 873 F.2d 229 (9th Cir. 1989) (single aggressive marketing plan does not make multiple bad loans one loss for insurance aggregation purposes). We have three discrete acts of malpractice here: (1) failure to advise of the existence and applicability of LTOB regulations; (2) giving wrong advice as to the amount of the LTOB limit; (3) giving wrong advice as to the aggregate LTOB limits when the borrowers had common ownership. And those discrete acts of malpractice resulted in discrete losses on seven loans. For this reason, and because insurance policies should be construed against the carrier, we affirm on this point. The aggregate limit should apply.

CONCLUSION

Because we find that FDIC is not entitled to double recovery of the amount paid by settling defendants, we REMAND this case to the district court to determine what portion of that settlement relates to the loans at issue in this case. Mmahat and the firm should then get a dollar-for-dollar credit for that amount. For the reasons stated above, the judgment of the district court is in all other things AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3160

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund, (substituted for Federal Savings and Loan Insurance Corporation, etc.)	FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund, (substituted for Federal Savings and Loan Insurance Corporation, etc.)
Plaintiff-Appellee Appellant	Plaintiff-
v.	v.
John A. MMAHAT and Mmahat & Duffy,	New England Insurance Co.,
Defendants-Appellants Appellee,	Defendant- Cross-Appellant.

Appeal from the
United States District Court
For the Eastern District of Louisiana

ON PETITION FOR REHEARING OF FEDERAL DEPOSIT INSURANCE CORPORATION and SUGGESTION FOR REHEARING EN BANC OF JOHN A. MMAHAT AND Mmahat & Duffy

September 24, 1990

(Opinion 8/3/90, 5th Cir., 1990, 907 F.2d 546)

Before GARZA, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing of Federal Deposit Insurance Corporation is DENIED.

The Petition for Rehearing En Banc of Mmahat & Mmahat & Duffy is also DENIED since no member of this panel nor Judge in regular active service on the court requested that the court be polled on the rehearing en banc. (Federal Rules of Appellate Procedure and Local Rule 35).

ENTERED FOR THE COURT:

/S REYNALDO G. GARZA

United States Circuit Judge

APPENDIX E

Excerpt of trial record

Page 1638, Line 13

through Page 1640, Line 17

(JUDGE SCHWARTZ)

"Upon retiring to the jury room, you will select one of your number as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in Court. A form of special verdict has been prepared for your convenience. You will take this form to the jury room. It reads as follows: 'United States District Court, Eastern District of Louisiana, FSLIC versus John A. Mmahat, et al, Civil Action No. 86-5160, Section A. Jury Interrogatories.

1. Do you find that there was an attorney-client relationship between the defendant John Mmahat and Gulf Federal? Answer yes or no. If your answer to Question 1 is 'Yes," please go to Question 2. If your answer to Question 1 is 'No,' please skip Questions 2 and 3 and go to Question 4.

2. Did defendant John Mmahat commit malpractice in his representation of Gulf Federal in connection with the loan-to-one borrower regulation? Answer yes or no. Please go to Question 3.

3. Did defendant John Mmahat breach his fiduciary duty towards Gulf Federal as an attorney in connection with the loan-to-one borrower regulation? Answer yes or nor. Please go to Question 4.

4. Do you find that there was an attorney-client relationship between the

law firm of Mmahat & Duffy and Gulf Federal? Answer yes or no. If your answer to Question 4 is 'Yes,' please go to Question 5. If your answers to both 1 and 4 are 'No,' please skip the remaining questions, date and sign this form and return to the Courtroom with your verdict. If you answer to Question 4 is 'No,' but you answered 'Yes,' to Questions 2 and/or 3, please skip Questions 5 and 6 and go to Question 7. If your answer to Question 1 is 'Yes,', but your answers to all Questions 2 through 4 are 'No,' please skip the remaining questions, date and sign this form and return to the Courtroom with your verdict.

5. Did defendant Mmahat & Duffy commit malpractice in its representation of Gulf Federal in connection with the loan-to-one borrower regulation? Answer yes or no. Please go to Question 6.

6. Did defendant Mmahat & Duffy breach its fiduciary duty towards Gulf Federal as attorneys in connection with the loan-to-one borrower regulation? Answer yes or no. If your answers to Questions 1, 5 and 6 are 'No,' please skip Question 7, date and sign this form and return to the Courtroom with your verdict. If your answers to all Questions 2, 3, 5 and 6 are 'No,' please skip Question 7, date and sign this form and return to the Courtroom with your verdict. If your answers to any or all of Questions 2, 3, 5 and/or 6 are 'Yes,' please go to Question 7.

7. Please state the amount of damages, if any, that will fairly and adequately compensate FSLIC for the damages sustained by Gulf Federal: Dollar sign, blank. Please sign and date this form and return to the Courtroom with your

verdict.'

There is a blank for the date and a place for the Foreperson to sign."

Page 1649 Line 11 through Page 1649 Line 17.

(BY MICHAEL ELLIS, ON BEHALF OF DEFENDANTS JOHN A. MMAHAT AND MMAHAT & DUFFY)

"Defendants also object on the failure to provide the jury with questions on the fault of third party particularly also officers and directors, questions on negligence or fault as proximate cause, questions on apportionment of the fault and also object on the ground that the questions submitted to the jury on damages does not reference mitigation of damages or that measure of damages should be the date of closure of Gulf Federal."

Interrogatory submitted by John A. Mmahat and Mmahat & Duffy

"3. Do you find that the plaintiff has proved by a preponderance of the evidence that the conduct of John A. Mmahat or Mmahat & Duffy, in a capacity as attorney to Gulf Federal, was the proximate cause of the damages which the plaintiff alleges?

Answer this question only for those parties for whom you answered "Yes" in the preceding question.

John A. Mmahat _____

Mmahat & Duffy _____

[If you answered "No" as to both parties, please sign this form and return it to the Marshal. Otherwise, go on to the next question.]"

APPENDIX F

28 U.S.C. § 1254(1)

Courts of appeals; certiorari; appeals; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...

APPENDIX G

12 U.S.C. §1730(k)(1) (repealed)

(k)**Jurisdiction and enforcement**

(1) Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy;...

APPENDIX H

Financial Institutions Reform, Recovery and Enforcement Act of 1989, ("FIRREA"), P.L. 101-73, §401(f), 103 Stat. 356

(f) SAVINGS PROVISIONS RELATING TO FSLIC.--

(1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.--

Subsection (a) shall not affect the validity of any right, duty, or obligation of the United States, the Federal Savings and Loan Insurance Corporation, or any other person, which--

(A) arises under or pursuant to any section of title IV of the National Housing Act; and

(B) existed on the day before the date of the enactment of this Act.

(2) CONTINUATION OF SUITS.--No action or other proceeding commenced by or against the Federal Savings and Loan Insurance Corporation, or any Federal home

loan bank with respect to any function of the Corporation which was delegated to employees of such bank, shall abate by reason of the enactment of this Act, except that the appropriate successor to the interests of such Corporation shall be substituted for the Corporation or the Federal home loan bank as a party to any such action or proceeding.

APPENDIX I

Financial Institutions Reform, Recovery and Enforcement Act of 1989, ("FIRREA"), P.L. 101-73, §407, 103 Stat. 363.

SEC. 407. REPEALS.

Title 4 of the National Housing Act (1724 et seq.) is hereby repealed.

APPENDIX J

Louisiana Civil Code Article 1803

REMISSION OF DEBT TO OR TRANSACTION OR COMPROMISE WITH ONE OBLIGOR

Remission of debt by the obligee in favor of one obligor, or a transaction or compromise between the obligee and one obligor, benefits the other solidary obligors in the amount of the portion of that obligor.

Surrender to one solidary obligor of the instrument evidencing the obligation gives rise to a presumption that the remission of debt was intended for the benefit of all the solidary obligors.

Louisiana Civil Code Article 1804

LIABILITY OF SOLIDARY OBLIGORS BETWEEN THEMSELVES

Among solidary obligors, each is

liable for his virile portion. If the obligation arises from a contract or quasi-contract, virile portions are equal in the absence of agreement or judgment to the contrary. If the obligation arises from an offense or quasi-offense, a virile portion is proportionate to the fault of each obligor.

A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from he other obligors no more than the virile portion of each.

If the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties.

Louisiana Civil Code Article 2323

COMPUTATION OF DAMAGES

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

Louisiana Civil Code Article 2324

LIABILITY AS SOLIDARY OR JOINT AND DIVISIBLE OBLIGATION

A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death or loss to recovery fifty percent of his recoverable damages; however, when the amount of recovery has been reduced in accordance with the preceding Article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault as been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be

joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

C. Interruption of prescription against one joint tortfeasor, whether the obligation is considered joint and divisible or solidary, is effective against all joint tortfeasors. Nothing in this Subsection shall be construed to affect in any manner the application of the provisions of R.S. 40:1229.41(G).

APPENDIX K

FEDERAL RULE OF EVIDENCE 803(8)(C)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ...

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth...

(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

APPENDIX L

11 U.S.C. § 523(a)(4)

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt -

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny;